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OFFICE OF PETITIONS

In re Application of
Laurent De Volder
Application No. 10/018,302
Filed: November 8, 2002
Attorney Docket No. U-013688-5

This is a decision on the "RESPONSE TO ON PETITION, RENEWED PETITION AND PETITION FOR SUPERVISORY AUTHORITY UNDER 37 CFR 1.181" filed April 28, 2008.

The petition is **DENIED**. This decision may be viewed as a final agency action within the meaning of 5 U.S.C. §704 for purposes of seeking judicial review. See MPEP 1002.02.

37 CFR 1.8 provides, in pertinent part, that:

(a) ... , correspondence required to be filed in the U.S. Patent and Trademark Office within a set period of time will be considered as being timely filed if the procedure described in this section is followed. The actual date of receipt will be used for all other purposes.

(1) Correspondence will be considered as being timely filed if:

(i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:

(A) Addressed as set out in § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail;

...

(ii) The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

BACKGROUND

The above-referenced application was held abandoned on August 14, 2003 for failure to file corrected drawings in response to the Notice of Allowability mailed May 13, 2003. Accordingly, a Notice of Abandonment was mailed October 10, 2003.

In a "REQUEST TO WITHDRAW HOLDING OF ABANDONMENT" filed October 23, 2003 (October 20, 2003 certificate of mail date), Petitioners argued that in response to the mailing of the Notice of Allowability, the replacement drawings had been timely filed on August 13, 2003. Included with the petition was a copy of the drawings, a postcard receipt date stamped August 15, 2003 and a "Letter Accompanying Amendment After Allowance" which indicated that the drawings were being amended.

While the documents included with the petition had a certificate of mailing, the certificate of mailing was not signed and neither was the response. Furthermore, the postcard receipt which is date stamped August 15, 2003, was not properly itemized to indicate that the drawings were included.¹ The petition was dismissed in a decision mailed November 29, 2004 by the Office of Publications and renewed petitions were filed December 13, 2004, June 7, 2005, and August 24, 2005 each of which were dismissed in decisions mailed May 31, 2005, August 18, 2005 and September 15, 2005, respectively by the Office of Publications.

A "PETITION UNDER 37 CFR 1.181(A)(3) TO INVOKE SUPERVISORY AUTHORITY AND WITHDRAW HOLDING OF ABANDONMENT" filed August 11, 2006 was dismissed in a decision by this office mailed October 31, 2007 because as the previous petitions consistently argued that the response to the Notice of Allowability was timely filed, the proof was not substantiated.

A "RESPONSE TO ON PETITION AND RENEWED PETITION" was filed November 14, 2007. Petitioner had not provided any additional proof to persuade the USPTO that in fact a timely response was filed on either August 13, 2003 or August 15, 2003. By decision mailed March 31, 2008, the holding of abandonment was held to be proper because the response was not received within the statutory period for response and the paper did not include a proper certificate of mailing to be considered timely filed as provided by 37 CFR 1.8.

¹The USPTO has a well-established and well-publicized practice of providing a receipt for papers filed in the USPTO to any applicant desiring a receipt. The practice requires that any paper for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. See section 503, Manual of Patent Examining Procedure (MPEP 503).

Comes now Petitioner with the instant request for reconsideration arguing that the USPTO lost the original response with a signed certificate of mailing and further that the USPTO is assuming that the certificate of mail submitted on petition was signed belatedly.

OPINION

As the certificate of mailing found on the papers was not signed, it is ineffective as evidence that the response to the Notice of Allowability was timely filed on August 13, 2003 and therefore cannot receive the benefits found under 37 CFR 1.8.

On instant renewed petition, Petitioner continues to maintain that the original certificate of mailing was signed and is entitled to the benefit of 37 CFR 1.8. Petitioner maintains that the position taken in the decisions that the certificate of mailing was signed belatedly is unsupportable.

Petitioner's contentions have been considered, and found unpersuasive.

The prior decisions are based on the fact that on petition the evidence provided included a certificate of mailing that was not signed. When noted in the decision that the certificate of mailing was not signed, on renewed petition filed June 7, 2005, Petitioner argued that the fact that the amendment was not signed was immaterial since the response was filed on August 15, 2005 as is evidenced by the postcard receipt. This line of reasoning raises a question as to whether the proffered signed Certification of Mailing, presented on renewed petition was authentic and not signed belatedly.

A signed certificate of mailing proffered as a substitute Certificate on petition is not an adequate certificate for the original mailing. As stated in 37 CFR 1.8(b), the showing required to have correspondence considered timely filed by being mailed in accordance with 37 CFR 1.8(a) includes supplying "an additional copy of the previously mailed or transmitted correspondence and certificate." There is no utility to the submission of a substitute Certification. The issue is whether the original certificate of mailing was in compliance. If it was not in compliance, filing of a substitute Certification is not an option to correct the deficiency. If a paper as originally filed does not satisfy 37 CFR 1.8, the USPTO must use the actual date of receipt in the USPTO as defined in 37 CFR 1.6.

The certificate of mailing on the paper was not signed. Petitioner cannot correct this error in procedure by submitting a signed certificate on renewed petition and Petitioner has not presented any evidence to substantiate a finding that the Certificate of Mailing was not signed belatedly. Instead from the evidence provided it appears that Petitioner

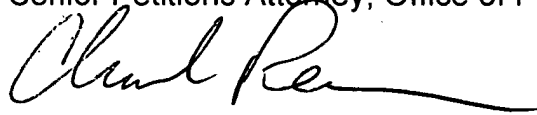
never retained a "True Copy" of the response and therefore the copy of the response did not bear a signed certificate of mailing. Accordingly, it was properly decided in the prior decisions that the paper should not be considered timely filed pursuant to 37 CFR 1.8. Thus, the abandonment of the application stands.

CONCLUSION

The prior decision, which refused to withdraw the holding of abandonment, has been reconsidered, and is affirmed.

As has been advised on several occasions for more than five years now, Petitioner is not precluded from filing a petition to revive pursuant to 37 CFR 1.137. However, continued delay in filing such a petition, after this final agency decision, may be determined to be intentional delay and may preclude revival of the application.

Telephone inquiries regarding this decision should be directed to Patricia Faison-Ball, Senior Petitions Attorney, Office of Petitions at 571-272-3212.

A handwritten signature in black ink, appearing to read "Charles Pearson", with a long horizontal flourish extending to the right.

Charles Pearson
Director
Office of Petitions